HJ MD ISON BABA

v.

SWEDISH MOTOR ASSEMBLIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[ORIGINATING MOTION NO: R1-25-126-98]
11 APRIL 2001

LABOUR LAW: *Industrial Court - Unfair dismissal - Award - Compensation - Whether quantum awarded appropriate - Applicant on verge of retirement - Whether entitled to compensation in lieu of reinstatement - Back wages - Industrial Court taking 55 years as retirement age in calculating back wages - Whether proper - Industrial Relations Act 1967 ss. 20(1), 30(4),(5)*

ADMINISTRATIVE LAW: *Remedies - Certiorari - Award by Industrial Court - Compensation for unfair dismissal - Principle of "Equity leans against double portions" - Applicability - Compensation sum deducted against benefits received from employer - Whether perverse - Whether principle wrongly applied - Whether certiorari to issue*

The applicant was dismissed from employment some ten months before attaining the age of 55 years. The Industrial Court, in awarding compensation for unfair dismissal, took the age of 55 as the retirement age and consequently awarded the applicant (i) ten months backwages amounting to RM61,740; and (ii) 18 months salary *in lieu* of reinstatement for his 18 years of service amounting to RM111,132. Having awarded the said sum of RM172,872, however, the Industrial Court took cognisance of the fact that the applicant had derived benefits amounting to RM167,091.37 from his employer ('Swedish Motor'), being a free car worth RM85,000 and RM82,091.37 from the latter's Group Pension Scheme. The Industrial Court, in the circumstances, took the view that the equitable principle of "equity leans against double portions", and s. 30(4) of the Industrial Relations Act 1967 ('the Act'), ought to be applied against the applicant, and so deducted RM167,091.37 from the total compensation awarded. The applicant contended that the Industrial Court had erred in law deciding the way it did, and therefore applied for an order of *certiorari* to quash the award.

Held:

[1] The finding by the Industrial Court that the retirement age for the applicant was 55 was not perverse and ought not to be disturbed. It follows that the Industrial Court did not err in ruling that the applicant was only entitled to be paid ten months' salary as his backwages.
(p 184 d-e)

[2] Re-instatement was clearly not appropriate nor viable as, when the award was made, the applicant had already reached the age of 55 years and the time lapse for him at Swedish Motor was only ten months from the date of unfair dismissal to the age of 55 years, the age of retirement. In the circumstances, the Industrial Court was wrong in awarding the equivalent of 18 months' salary as compensation *in lieu* of reinstatement. (p 185 f)

[3] There was no dispute that the car was not part of the applicant's terms of service and that its book value was RM85,000 when the applicant was handed the same for free. There was hence no error in the Industrial Court considering that this amount was deductible. (p 186 c-d)

[3a] The Industrial Court was however wrong in law in deducting the sum payable to the applicant under the Group Pension Scheme from the total compensation payable. The applicant had contributed to the sum and was contractually and lawfully entitled to it. (p 186 e-f)

[4] The Industrial Court, in deducting the value of the car from the total compensation payable, did not infringe the principle of "equity leans against double portions". Clearly, a workman ought not to be allowed to take double advantage and make excessive gains on the wrongful act of his employer. However, the court was wrong in applying this principle for the deduction of the amount paid to the applicant under the Pension Benefit Scheme. (p 187 e)

[5] Section 30(4) of the Act ought not to be applied by the Industrial Court in making the award because the subject matter herein was not a trade dispute reference but a reference under 20(3) of the Act. A trade dispute, on the contrary, would fall under a reference to the Industrial Court under s. 26 of the Act. (p 186 g)

[6] The Industrial Court had committed several errors of law in its decision. However, allowing the application and remitting the case for reconsideration would be an exercise in futility, as the applicant, not being entitled to the compensation *in lieu* of reinstatement, would end up getting nothing in compensation. (p 187 f)

[Application dismissed.]

Case(s) referred to:

Koperasi Serbaguna Sanya Bhd, Sabah v. Dr James Alfred [2000] 3 CLJ 758 ***(refd)***
Rama Chandran v. Industrial Court of Malaysia [1997] 1 CLJ 147 ***(refd)***
Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba [1998] 3 ILR 367 ***(refd)***
Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba [1995] 2 ILR 198 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 20(1), (3), 26, 30(4), (5)

Other source(s) referred to:
OA Malhotra, *The Law On Industrial Disputes*, 2 edn, vol 11, p 941

For the applicant - LG Seah; M/s Lobo & Assoc
For the respondent - Raymond TC Low; M/s Shearn Delamore & Co

Reported by WA Sharif

JUDGMENT

KC Vohrah J:

This is an application for *certiorari* to issue in respect of *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1998] 3 ILR 367 (the award) which was handed down by the Industrial Court after the Court of Appeal had ordered the court to determine the appropriate remedy to be awarded to Hj Md Ison bin Baba (Md Ison) who had been employed by Swedish Motor Assemblies Sdn Bhd (Swedish Motor), the respondent, at its Assembly Plant in Shah Alam.

How the Court of Appeal's order comes into the picture must be recounted.

Md Ison had joined Swedish Motor on 1 September 1975. His last drawn salary was RM6,174 per month and he was also given the use of a company maintained motor car.

Md Ison signed a letter of resignation in October 1992 that had been prepared by Swedish Motor as well as an agreement relating, *inter alia*, to some benefits. Md Ison said he was forced to sign the letter of resignation and considered himself to have been dismissed without just cause and filed representations under s. 20(1) of the Industrial Relations Act 1967 (the Act).

Md Ison's case was subsequently referred to the Industrial Court. The Industrial Court after having had a hearing handed down *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1995] 2 ILR 198 which dismissed Md Ison's claim.

Md Ison then applied to the High Court for an order of *certiorari* to quash this award and for an order of *mandamus* for a different division of the Industrial Court to determine his case. On 1 August 1997 the High Court granted Md Ison's application.

Swedish Motor was dissatisfied with the High Court decision and appealed to the Court of Appeal. On 15 January 1998, the Court of Appeal dismissed Swedish Motor's appeal and made the following orders:

1. The appeal is dismissed;

2. The order of *certiorari* is affirmed;

3. The order remitting the case for readjudication by the Industrial Court be and is hereby set aside and there be a finding in favour of the respondent that he was dismissed without just cause or excuse;

4. That the matter be remitted to the Industrial Court to determine the appropriate remedy to be awarded to the respondent;

5. The cost of this appeal be taxed and paid to the respondent; and

6. The deposit to be paid out to the respondent to account of is taxed costs.

The same chairman of the Industrial Court proceeded to determine the quantum payable. The Industrial Court computed the compensation for Md Ison as follows (taking 55 years as the age of retirement):

Backwages of ten months	- RM 61,740
18 months of salary for his 18 years of service	- RM 111,132
Total compensation	- RM 172,872

The Industrial Court, however, took cognisance of the fact that on the termination of his service Md Ison had derived benefits amounting to RM167,091.37 a Volvo 740 GLE car worth RM85,000 (book value) free of charge and the sum of RM82,091.37 from Swedish Motor under its Group Pension Scheme.

The Industrial Court held that since Md Ison had derived the aforesaid benefits, it was not appropriate or fair that any other additional payments should be paid which can be construed as being inconsistent with sub-s. (4) and (5) of s. 30 of the Act.

In taking cognisance of the aforesaid benefits, the Industrial Court held that it was 'just and equitable' that Md Ison was only entitled to receive RM5,780 as the amount after deducting RM167,091.37 (the amount arising from the aforesaid benefits) from RM172,972 (the total compensation).

In attacking the award, Md Ison cites three grounds:

(1) That the Industrial Court had erred in law when it held that Md Ison was only required to be paid a sum equivalent to ten months' salary as backwages and 18 months' salary (one month for every year of completed service) as compensation *in lieu* of reinstatement.

(2) That the Industrial Court had erred in law and/or acted on an incorrect basis of fact when it deducted the sum of RM167,091.37 from the total compensation and backwages which were to be awarded to Md Ison especially in view of the following facts:

(i) The sum of RM85,000 that was purportedly the price of the Volvo 740 GLE car was actually the book-value of the car at the material time;

(ii) The sum of RM82,091.37 being the sum payable to Md Ison under the Swedish Motor Group Pension Scheme was actually a sum to which Md Ison had also contributed and to which he was entitled to on maturity pursuant to a separate agreement.

(3) The Industrial Court erred in law when it applied the equitable principle that "equity leans against double portions", and also for considering that Swedish Motor had "come to equity with unclean hands".

The 1st Ground

It was argued that the chairman was wrong in taking 55 years as the age of retirement so that Md Ison had only ten months to serve before reaching the retirement age and therefore he was also entitled to ten months backwages. It was argued that there was evidence that the retirement age was not necessarily 55 and that it was at the discretion of Swedish Motor whether to extend the retirement age. So far as this court is concerned the chairman had made a finding of fact that the retirement age for Md Ison was 55 and I do not propose to disturb a finding of fact; it was not perverse – he had evidence to come to that conclusion, indeed Md Ison in his evidence had said he had ten months left prior to his retirement.

There was the other argument that the practice of the Industrial Court is to fix compensation at 24 months if the matter decided took more than two years after dismissal. That may well be so. As far as I can see in our case re-instatement was clearly not viable as when the Award was made he had already reached 55 years and the time lapse for him at Swedish Motor was only ten months from the date of unfair dismissal to the age of 55 years, the age of retirement.

It will be noted that in *Rama Chandran v. Industrial Court of Malaysia* [1997] 1 CLJ 147 wherein the Federal Court awarded the claimant future loss of earnings but limited it up to the date of retirement, Edgar Joseph FCJ stated at p. 164:

> I would say that the Employee is entitled to all moneys due to him in respect of his salary and all other emoluments, under his contract of service, as from the date of his invalid dismissal until his retirement had he not been wrongfully dismissed.

As I had mentioned Md Ison had only ten months to go before reaching retirement age when he was unfairly dismissed. Re-instatement was inappropriate as he was virtually on the verge of retirement even if the

Industrial Court had decided the matter before his retirement. OA Malhotra in *The Law On Industrial Dispute*, 2 edn, vol 11 at p. 941 has this to say on a similar matter:

> On the facts and circumstances of the case, the award of reinstatement was held to be inappropriate. Such a relief can also be refused where the workman is virtually on the verge of retirement or is so old and infirm as to be incapable of discharging his duties. In *Management of Metal Box of India Ltd v. Presiding Officer*, Additional Labour Court, Madras CA No 18 (NL) of 1983 arising out of SLP No 9851 of 1982 decided by the Supreme Court on January 3, 1983, the court modified the order of reinstatement in view of the superannuation of the workman and directed the payment of backwages and other benefits up to the date of retirement of the workman.

It will be noted that the Industrial Court not only awarded a sum equivalent to ten months' salary as back-wages but also 18 months' salary (one month for every year of completed service) **as compensation *in lieu* of re-instatement**. Swedish Motor has pointed out that the compensation *in lieu* of re-instatement does not arise at the time the Industrial Court computed the compensation payable to Md Ison as he had already reached his retirement age and could not be re-instated beyond his retirement age. From the evidence it seems clear that if Md Ison had not been dismissed but had been allowed to retire he would have only received ten months' salary plus a gratuity of RM82,091.37 from the Group Pension Scheme.

While I cannot see any merit in the 1st ground that the Industrial Court erred in law when it held that Md Ison was only required to be paid a sum equivalent to ten months' salary as backwages using 55 years as the age of retirement it appears to me that the Industrial Court was wrong in awarding the equivalent of 18 months' salary as compensation *in lieu* of re-instatement when the court was not entitled to do so. It has to be noted, however, that Swedish Motor did not file an application to set aside the award on this ground or any other ground.

The 2nd Ground

The Industrial Court after awarding backwages of RM61,740 and 18 months' salary for Md Ison's 18 years of service at RM111,132, making it a total of RM172,872 deducted from this total amount the sum of RM167,091 being the value of benefits which the court held he received in respect of a free car, a Volvo 740 GLE, and the sum of RM82,091.37 from Swedish Motor's Group Pension Scheme.

As for the deduction for the Volvo car Md Ison disputed that it was actual book value and argued that the Industrial Court had no proper basis to deduct the said book value from the compensation payable to him and that the Industrial Court had erred in law.

As for the deduction of the amount from the Group Pension Scheme the argument was that Md Ison was required and had contributed to the said scheme under an agreement and there was nothing in the said agreement to say if the applicant is unjustly dismissed any sum payable will be used to offset any liability that may be incurred by Swedish Motor. And that by deducting the said sum the Industrial Court had wrongly reduced the liability of Swedish Motor and deprived Md Ison of what is lawfully due to him.

It was also submitted that in making the deductions for the value of the car and the sum under the Group Pension Scheme the Industrial Court had wrongly applied s. 30(4) of the Act.

The book value of the car arrived at by the Industrial Court is a finding of fact and is not perverse; there is evidence to support the finding bearing in mind Md Ison himself had himself testified that the book value of the car was RM85,000 at the time he was handed over the car for free and that it was not part of the terms of his service. I see no error in the court considering that this amount was deductible.

As for the sum which Md Ison had received earlier under the Group Pension Scheme I think it is clear that he was entitled to the pension benefit which had to be paid to him in any event.

In deducting this amount from the total compensation payable it was implicit that the Industrial Court was of the view that Md Ison was not entitled to the pension benefit on retirement. That clearly is erroneous because the documentary evidence shows that Md Ison had contributed to the sum and was contractually entitled to it on maturity pursuant to a separate agreement. It was lawfully due to him. And the Industrial Court was wrong in law to have deducted that from the total compensation payable.

When making the deduction for the value of the car and the sum under the Group Pension Scheme the Industrial Court had stated that it had applied s. 30(4) of the Act. This is an error of law on the part of the Industrial Court because s. 30(4) cannot be applied to an award made in respect of a representation under s. 20(3) of the said Act (such as in Md Ison's case). Section 30(4) reads as follows:

> In making its award in respect of a **trade dispute**, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries. (emphasis added).

It is clear that s. 30(4) ought not to have been applied by the Industrial Court in making the award because the subject matter was not a trade dispute reference. A trade dispute would fall under a reference to the Industrial Court under s. 26 of the said Act.

I agree that the Industrial Court had erred in its decision-making process when it came to determining the remedy to be given to Md Ison.

The deduction was based on a section that should not be applied by the Industrial Court to Md Ison's case.

3rd Ground

The Industrial Court applied the equitable principle that equity leans against double portions when making the two deductions earlier discussed. I think it is important to remind ourselves that a "workman cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employers" the principle having been approved by the Court of Appeal. In *Koperasi Serbaguna Sanya Bhd, Sabah v. Dr James Alfred* [2000] 2 CLJ 758 wherein the Court of Appeal cited with approval the following passage from "*The Law on Industrial Disputes* by Malhotra, 2 edn":

> A workman directed under an award to be reinstated with backwages would not be entitled to backwages for the period during which he was usefully employed elsewhere, because he cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employers.

That the value of the car (which was given to Md Ison) was deducted from the total compensation payable does not infringe the above principle. That the amount paid to Md Ison under the pension benefit scheme was deducted as I had earlier discussed is wrong in law.

There have been several errors of law committed by the Industrial Court. I have considered what I should do in all the circumstances of the case. If I were to allow the application and remit the case for reconsideration based on the several omissions committed by the court the exercise will be an exercise of futility for Md Ison as he will not get anything in compensation. However from the submission of Swedish Motor the argument is that the application ought to be dismissed as Md Ison has already been unjustly enriched. I also bear in mind that Swedish Motor did not file an application of *certiorari* to set aside the award on the ground that Md Ison was not entitled to the compensation *in lieu* of re-instatement and in fact my view, as I had stated earlier, is that he was not entitled to it. If the case is remitted to the Industrial Court the court is bound to take that view into consideration and clearly Md Ison will then not be entitled to anything. There will be no injustice if I therefore exercise my discretion and dismiss the application with no order as to costs.